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Submitted Electronically: <https://www.regulations.gov>

Clayton Cope
Solid Waste and Emergency Response Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: Notice of Proposed Consent Decree – Unreasonable Delay Claim Regarding Discarded Polyvinyl Chloride Listing (Docket ID No. EPA–HQ– OGC–2022–0406)¹

Dear Mr. Cope:

The Associated General Contractors of America (AGC) appreciates the opportunity to respond to the U.S. Environmental Protection Agency’s (EPA) request for public input on a proposed consent decree that orders EPA to act on the Center for Biological Diversity’s (CBD) 2014 petition to designate (“list”) discarded polyvinyl chloride (PVC) as hazardous waste and to revise the solid waste management guidelines on disposal of PVC. The proposed consent decree requires EPA to:

- Issue a proposed decision granting or denying CBD’s petition within nine months after the decree is signed.
- Issue a final decision by April 12, 2024.

If EPA grants the petition, EPA must promptly commence an appropriate proceeding, and all relevant procedural requirements for rulemaking will apply.² If EPA denies the petition, the reasons for denial must be published in the *Federal Register*.

The consent decree would resolve *Center for Biological Diversity v. U.S. Environmental Protection Agency*, et al., a case in the United States District Court for the District of Columbia (1:21–cv– 2210–JDB) that alleges EPA unreasonably delayed taking action on a petition to list discarded (PVC) as hazardous waste under the Resource Conservation and Recovery Act (RCRA) – per CBD’s August 2021 complaint.

EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Administrative Procedures Act (APA) or RCRA.

¹ Docket ID No. EPA–HQ– OGC–2022–0406 online at <https://www.regulations.gov/document/EPA-HQ-OGC-2022-0406-0001>.

² Notably, the granting of the petition merely serves as a starting point for EPA to take an action. This action would require notice-and-comment rulemaking.

As explained in this letter, AGC strongly maintains that the proposed consent decree does not provide EPA with adequate time to address the merits of the CBD's petition. As drafted, the proposed consent decree is not in the public interest and not in accordance with RCRA and the APA.

About AGC

AGC of America is the nation's largest and most diverse trade association in the construction industry. The association represents more than 27,000 members through a network of chapters in all 50 states, the District of Columbia, and Puerto Rico. Our commercial construction firms are engaged in building, heavy, civil, industrial, utility, and other construction for both public and private property owners and developers. Collectively, AGC member firms build much if not most of the nation's public and private infrastructure.³ The construction industry (residential and nonresidential) comprises a high number of small businesses. Ninety-three percent have fewer than 20 employees. The agency's proposal would be especially helpful for small businesses in construction.

PVC is widely used in many building and construction products – and it contributes to the quality, safety, and cost-effectiveness of construction materials. Its strong, lightweight, durable and versatile characteristics make it ideal for products such as window profiles, and its flexibility, flame retardant and electrical insulation properties make it ideal for cabling applications.⁴ PVC pipes deliver clean drinking water and PVC landfill liners prevent groundwater contamination. PVC is also used to produce electrical conduit. AGC is unaware of any scientific data that would warrant a determination to include PVC as a hazardous waste under RCRA or other federal statutes.

A Hazardous Classification Would Complicate Construction, Exacerbate Supply Chain Issues and Impose Regulatory Risk and New Liability on Contractors

CBD's petition seeks to have EPA affirm that finished materials and products containing PVC are hazardous when discarded – including discarded PVC pipe and other PVC-containing materials used at construction sites. While it remains to be seen whether EPA will propose to grant CBD's RCRA petition and move forward with rulemaking, hazardous waste regulation of PVC could have significant, far-reaching implications for anyone that generates, stores, transports, or otherwise manages discarded PVC, including companies that dispose of or recycle PVC.

³ AGC members are regularly engaged in the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

⁴ Examples of PVC construction products include:

- Window and door profiles and conservatories
- Pipes and fittings
- Power, data and telecoms wiring and cables
- Internal and external cladding
- Cable and ducting
- Roofing membranes
- Flooring
- Wallcoverings.

Specifically, a classification of discarded PVC as hazardous waste would create significant regulatory risk and new liability exposure for construction firms engaged in deconstruction and demolition as well as new builds. It would also significantly increase construction materials costs, impact waste management, and put beneficial reuse and recycling activities in jeopardy.

Because PVC-containing materials are so prevalent in construction operations (for example, contractors run into it anytime they are excavating a roadway or renovating a building), classifying the material as hazardous would change most company's "generator status" under RCRA Subtitle C, and subject contractors to stringent rules on handling, transport, and disposal. This would add costs to construction projects, including more administrative overhead, training, and overall program/project management.

AGC is also interested in regulatory determinations concerning PVC because of the possibility for increased contractor Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) liability where soils or C&D debris contain such materials. Contractors who may have unknowingly interacted with any of the numerous PVC products on projects during demolition, earthmoving or dewatering activities could be at risk. In addition, contractors could find themselves liable for the construction and demolition debris (roadwork material, excavated material, demo waste, construction/renovation waste, and site clearance waste) they sent previously to a landfill for disposal.

AGC also questions if there is adequate landfill capacity to accept the controlled disposal of discarded PVC materials.

What is more, if discarded PVC plastic is categorized as hazardous waste under RCRA, it would create a "stigma" against using construction products that contain the material; this would, in turn, exacerbate the current materials shortages and supply chain delays as "owners" search for PVC-free versions of popular products. In the construction sector, building materials are in short supply and have seen price spikes, driving up project and rebuilding costs and affecting construction firms everywhere. Uncertainty about the availability of materials is already complicating business for construction companies as they try to price out bids and meet project timelines/guidelines.

If contractors are no longer able to use PVC-containing construction materials and products the impacts would be dramatically felt across the supply chain. Manufacturers would have to determine if there were: a suitable substitute for PVC for making their products; suppliers of the substitute able to meet demand; and existing manufacturing processes for incorporating that substitute in a safe, efficient and effective manner. As it stands, the timeline presented by this consent decree and the time needed for manufacturers to adjust would likely throw supply chains into further disruption.

Sue & Settle

As a threshold matter, AGC has long been concerned about EPA resolving lawsuits filed against it through consent decrees and settlement agreements that have the effect of creating agency priorities and rules outside the normal administrative processes.

While AGC appreciates the transparency in this consent decree process,⁵ the opportunity to comment on the draft agreement does not give the public real input. In this case, the consent decree includes deadlines that will not provide sufficient time for EPA to solicit adequate feedback about how regulation will affect those covered by it. EPA needs more time to learn from all stakeholders about problems before they get locked into a regulation.

Impact on Small Business

AGC-member small businesses use PVC materials and products. For all the reasons outlined above, the impact of designating PVC as hazardous waste would have a significant impact on a substantial number of small entities; therefore, EPA must convene a small business advocacy review *panel* prior to proposing any rule and conduct an Initial Regulatory Flexibility Analysis. Failure to do so will violate the 1996 Small Business Regulatory Enforcement Fairness Act (SBREFA).

AGC expects that EPA will issue information requests to PVC industry stakeholders to obtain data on PVC waste generation, management, and disposal. AGC would welcome the opportunity to meet with EPA staff and share information, as the agency looks to build an administrative record to support its decision. It is imperative that the agency consider credible and comprehensive data and the economic implications of classifying one of today's most widely used plastics as hazardous waste.

Thank you for the opportunity to provide comments.

Respectfully Submitted,



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⁵ EPA has posted online for review and comment by the public the proposed consent decree lodged in federal court to resolve claims against the agency - <https://www.epa.gov/ogc/proposed-consent-decrees-and-draft-settlement-agreements>. EPA also posted online the 60-day notice of intent to sue the agency after receiving such notice from Center for Biological Diversity and the corresponding complaint for declaratory and other relief that was filed in federal court - <https://www.epa.gov/ogc/notices-intent-sue-us-environmental-protection-agency-epa>.